

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7044

Petition of City of Burlington, d/b/a Burlington)
Telecom, for a certificate of public good to)
operate a cable television system in the City of)
Burlington, Vermont (In Re: Amended Petition)
to amend Condition No. 17 of CPG related to)
completion of system build-out and to grant)
temporary relief from limitation in Condition)
No. 60 of CPG on financing operations))

Order entered: 11/24/2009

SCHEDULING ORDER, RULING ON MOTION TO INTERVENE AND REQUEST FOR COMMENTS

The City of Burlington, d/b/a Burlington Telecom ("Burlington Telecom"), filed an amended petition in this docket on September 30, 2009. Burlington Telecom now requests temporary relief from the limitation of Condition No. 60 of its Certificate of Public Good ("CPG"), relating to the manner in which the City of Burlington may finance its operations, as well as changes to Condition No. 17. On October 13, 2009, I issued a procedural order in which the parties were urged to renew their efforts to resolve outstanding discovery disputes and motions and to reach agreement on a revised schedule for completing this investigation in light of the amended petition.

Burlington Telecom notified the Board in a filing on November 6, 2009, that the parties had agreed to a new proposed schedule for this proceeding. Burlington Telecom also advised the Board that it had reached agreement with Comcast on outstanding discovery matters, subject to the right to renew such motions in the future, and accordingly there was no need for a ruling on any of the pending discovery motions.

In this Order, I establish a new schedule for this proceeding, deny the motion for permissive intervention filed on October 23, 2009, by the Burlington Police Officers Association,

and solicit comments from the parties as to the advisability of a separate investigation at this time into the apparent existing violation of Condition 60 of the CPG.

Schedule

I accept the parties' proposed schedule with only one change, to provide more flexibility as to the date of the technical hearing because of possible scheduling conflicts. The parties had proposed the technical hearing occur during the week of May 3, 2010. The new schedule is as follows:

Date	Event
December 4, 2009	Deadline for further motions to intervene
December 11, 2009	Responses to motions to intervene
November 13, 2009	Burlington Telecom served supplemental responses to Comcast's 1 st set of discovery requests
November 20, 2009	2 nd round of discovery served on Burlington Telecom
December 4, 2009	Burlington Telecom responds to 2 nd round of discovery
December 18, 2009	3 rd round of discovery on Burlington Telecom
January 6, 2010	Burlington Telecom responds to 3 rd round of discovery
January 22, 2010	Comcast and Department pre-file testimony, provided in the case of the Department that its planned audit of Burlington Telecom has been completed by January 22
February 5, 2010	Discovery served on Department and Comcast
February 19, 2010	Department and Comcast respond to discovery requests
March 5, 2010	2 nd round of discovery on Department and Comcast
March 19, 2010	Department and Comcast respond to 2 nd round of discovery
April 2, 2010	Burlington Telecom pre-files rebuttal testimony
April 9, 2010	Discovery served on Burlington Telecom related to rebuttal testimony
April 16, 2010	Burlington Telecom responds to rebuttal testimony discovery

On 5 days' notice during applicable discovery periods	Depositions
Technical Hearing	Week of May 3 or May 10, 2010
14 days after hearing	Initial Briefs
21 days after hearing	Reply Briefs

I would like to remind the parties to submit one copy of each discovery request and each response in this docket to the Board. I also ask that the parties, if possible, electronically submit such requests and responses as attachments to e-mails addressed to the Clerk of the Board.

Ruling on Motion for Permissive Intervention

The Burlington Police Officers Association ("Association") filed a motion for permission to intervene in this proceeding on October 23, 2009. The Association is in negotiations with the City of Burlington for a new collective bargaining agreement to replace an agreement that expired on June 30, 2009. The Association is concerned that the amended petition involves significant financial obligations and responsibilities of the city and that the outcome of this proceeding could affect the resources of the city to negotiate a new collective bargaining agreement with the city.

Burlington Telecom filed a memorandum in opposition to the motion to intervene by the Association on November 6, 2009. Burlington Telecom argued that the Association failed to demonstrate any substantial interest that may be affected by this proceeding and that the collective bargaining process provided an alternative means for the Association to protect any claimed interest in the proceeding. On November 13, 2009, the Department also filed a letter in opposition to the Association's motion to intervene, indicating that it opposed the motion for the same reasons that were stated in Burlington Telecom's memorandum in opposition to the motion.

Rule 2.209(B) of the Board's Rules of Practice governs motions for permissive intervention. It provides:

Upon timely application, a person may, in the discretion of the Board, be permitted to intervene in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. In exercising its discretion in this paragraph, the Board shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

While the Association's concern about how this proceeding may affect the financial resources of the City of Burlington is understandable, I do not believe it is appropriate to grant the Association's motion because the Association has not demonstrated a substantial interest that may be affected by the outcome of this proceeding and, in any case, alternative means exist to protect whatever interest it may have in this proceeding. Municipal governments take on many significant commitments and are often involved in proceedings that may affect their financial obligations and resources. To permit someone to intervene in a proceeding on the basis that its negotiations with a municipal government may be affected by the impact of the proceeding on the financial resources of the municipal government would set an unfortunate precedent that could greatly expand the boundaries for permissive interventions in other proceedings. Moreover, the Association has a separate and more appropriate forum, its on-going negotiations, in which it can address its concerns. The motion to intervene is denied.

At the same time, the Board would welcome at any time any comments the Association may have on the matters that are the subject of this proceeding, which will be included in the record as public comments. Also, if the Association desires, it can be added to the list of interested persons in this docket by contacting the Clerk of the Board and thereby receive a copy of all orders and hearing notices in this docket.

Solicitation of Comments

Finally, the Board has asked me to solicit comments from the parties in this docket as to whether the Board should open a separate docket for an investigation of the apparent violation of Condition 60 of the CPG. The Board regards the apparent violation of Condition 60, and any failure to advise the Department and the Board promptly about such violation, as particularly serious matters. The Board's concern about these matters is heightened in light of the ostensible directives in the Burlington City Charter and state statutes that losses of Burlington Telecom not be borne by city taxpayers.¹ Accordingly, it is important for the Board to assess the risks created for the city's taxpayers by the apparent violation of the CPG, to resolve whether such violation occurred, and to determine the appropriate remedies for such violation.

At the same time, the Board seeks to play as constructive a role as possible in addressing the fundamental concerns related to the apparent violation and in helping to resolve this situation consistent with its statutory responsibilities. The creation of a separate docket at this time for the investigation of the apparent violation of Condition 60 may involve substantial overlap with this docket in terms of discovery and the development of an evidentiary record and could divert the resources of the parties. To the extent the Department believes that constructive progress is being made in an appropriate and expeditious manner to address fundamental concerns related to the apparent violation, and to resolve related matters in this docket, the Board may elect not to open a separate docket for an investigation at this time. If that is the case, the Board may postpone a decision about whether to open a separate docket for an investigation, or to expand the scope of this proceeding to encompass an investigation, until such time as there is a clearer and fuller evidentiary record in this docket.

The Board requests that any comments by the parties on these matters be submitted to the Board by December 7, 2009.

SO ORDERED.

1. See 24 App. V.S.A. § 438(c)(1) and 24 V.S.A. § 1913(e).

Dated at Montpelier, Vermont, this 24th day of November, 2009.

s/John Bentley

John Bentley, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: November 24, 2009

ATTEST: s/Susan M. Hudson

Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)